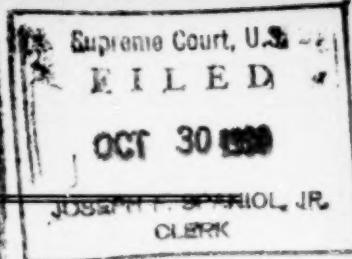


90-699

No. 90-



In The

**Supreme Court of the United States**

**October Term, 1990**

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UNITED TRANSPORTATION UNION,

*Petitioner,*

v.

CSX TRANSPORTATION, INC.,

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

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---



**QUESTION PRESENTED**

Whether courts may vacate Public Law Board arbitration awards under Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q), by taking issue with the statutorily conclusive findings of the Board as to the practices at issue, thus supplanting the Board as the exclusive agency for resolution of "minor disputes" under the Act.

**PARTIES BELOW**

The parties listed in the caption, United Transportation Union and CSX Transportation, Inc., are the only parties of record.

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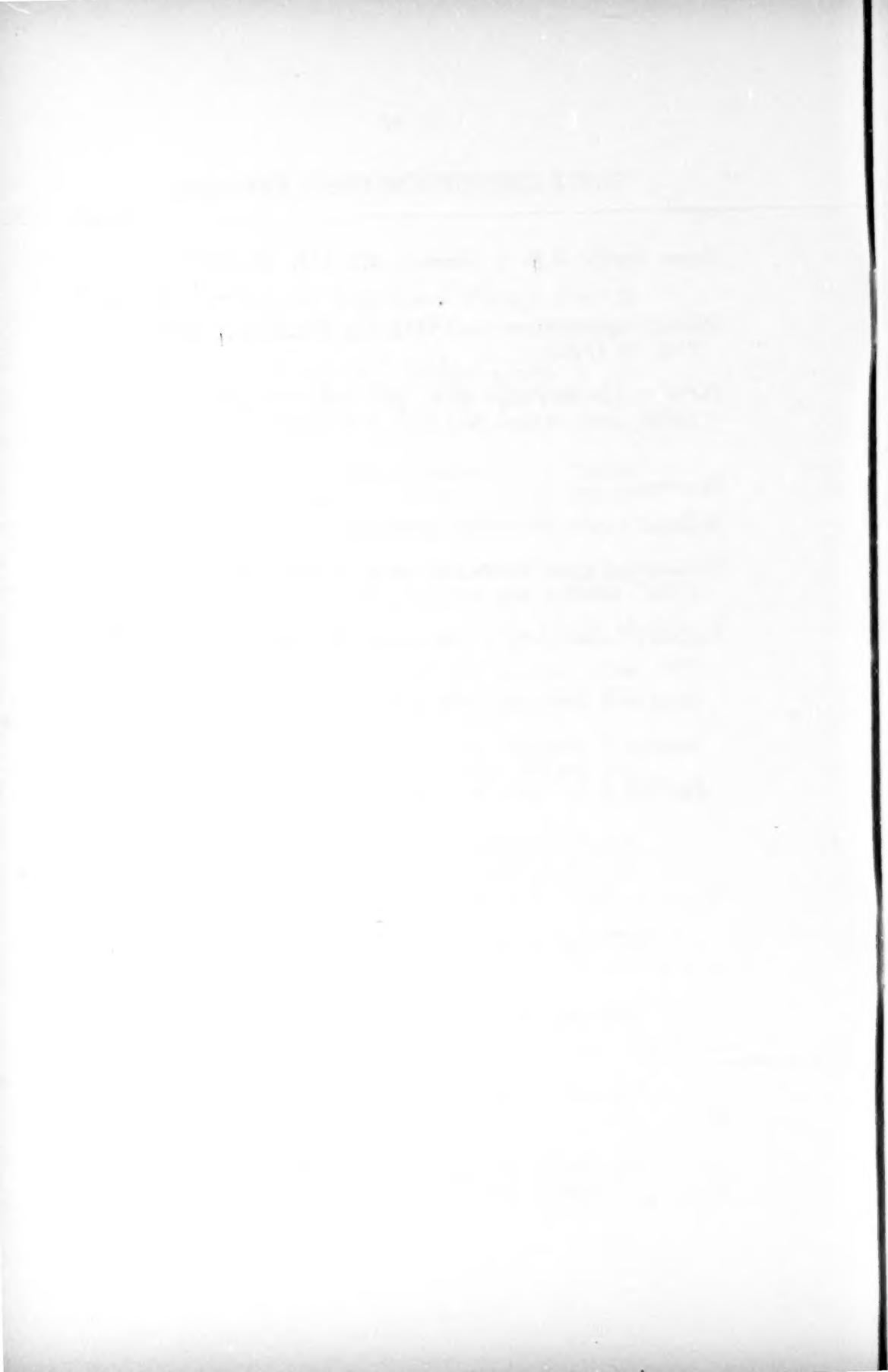
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No. 90-

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In The

**Supreme Court of the United States**

**October Term, 1990**

---

**UNITED TRANSPORTATION UNION,**

*Petitioner,*

v.

**CSX TRANSPORTATION, INC.,**

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

Petitioner United Transportation Union ("UTU") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

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**OPINIONS BELOW**

The original opinions and decision of the court of appeals are unreported and are reproduced in the Appendix ("App.") at 4a to 25a. The later order of the court of appeals order amending the original opinions and decision is unreported and is reproduced in the appendix at

1a to 2a. The Memorandum of Opinion of the United States District Court for the Northern District of Ohio, Eastern Division is unreported and is reproduced in the appendix at 26a to 33a.

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### **JURISDICTION**

The original decision and opinions of the court of appeals were filed April 26, 1990. The order of the court of appeals changing the original decision and amending the opinions was filed June 19, 1990. UTU timely filed a petition for rehearing and hearing *en banc* on July 3, 1990. On August 2, 1990, that petition was denied. App. at 3a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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### **STATUTORY PROVISIONS INVOLVED**

Section 3 First(p) of the Railway Labor Act, 45 U.S.C. §153 First(p), provides as follows:

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q), provides as follows:

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the

clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

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#### STATEMENT OF CASE

Petitioner UTU filed its petition in the United States District Court for the Northern District of Ohio, Eastern Division to enforce Award Nos. 120 and 121 of Public Law Board<sup>1</sup> 3290 pursuant to Section 3 First(p) of the Railway Labor Act, 45 U.S.C. §153 First(p), on July 31,

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<sup>1</sup> The special boards of adjustment authorized by the 1966 amendments to Section 3 Second of the Railway Labor Act, 45 U.S.C. §153 Second (80 Stat. 208, 209) as alternative forums to the National Railroad Adjustment Board are commonly established and referred to as "public law boards" because Public Law 89-456 (*id.*) permitted their creation. *See, Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1199 (7th Cir. 1987).

1987. Respondent CSX Transportation, Inc. ("CSX") answered September 23, 1987, and counterclaimed for review of the awards, asking that they be set aside pursuant to Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q).

The two awards concerned disputes at Cumberland, Maryland and Akron, Ohio where CSX claimed a right to control traffic through construction areas by using "train orders" and "proceed signals" given by non-UTU personnel, rather than assigning the task of "flagging" oncoming trains to a stop to UTU-represented employees. App. at 4a-5a. Failing adjustment of the disputes, UTU and CSX referred them to the Board for resolution. App. at 6a. The Board found in favor of UTU in both cases, finding in the Akron case the "*a flagging service was both needed and essentially being performed*" (emphasis added) and to the same effect in the Cumberland dispute. App. at 6a-7a. CSX had conceded that if flagging is afforded any train, UTU-represented personnel must be used. App. at 28a-29a.

On March 20, 1989, the district court issued an order granting the CSX motion for summary judgment, denying UTU's motion for summary judgment, and vacating Award Numbers 120 and 121 of Public Law Board 3290 (App. at 34a) based upon its Memorandum of Opinion of the same date (App. at 26a-33a). While acknowledging the explicit finding of the Board in the Akron dispute that flagging was "*essentially being performed*," the district court found that "*the award read as a whole indicates that the focus was on the need for flagging as opposed to its use*" (App. at 33a, n. 5) and vacated the awards as

being outside the jurisdiction of the Board. App. at 33a-34a.

Initially, the court of appeals reversed and remanded the case to the district court with directions to enforce the awards in the decision and opinions issued April 26, 1990 (App. at 4a-25a). At that time, Judge Lively's opinion governed disposition of the case. The reversal and remand with instructions to enforce the Board awards was mandated principally by the Court's decisions in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965), and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. \_\_\_\_ 105 L.Ed. 2d 250 (1990) in holding that the finding of the Board that flagging was essentially being performed was conclusive and that there was room for interpretation of the CSX position that it could operate by train order. App. at 9a-11a, 13a-15a.

However, after consideration of the motion of respondent CSX to amend the judgment to conform to the opinions or, in the alternative, (petition) for rehearing and suggestion for rehearing en banc, the court of appeals issued an order June 19, 1990 effectively making the original majority opinion the dissent, and vice versa (App. at 1a-2a), and affirming the district court's vacation of the awards. By that time, Judge Kennedy's opinion controlled, and affirmed the district court's vacation of the awards. *Union Pacific R.R. v. Sheehan*, *supra*, *Gunther v. San Diego & Arizona Eastern Ry.*, *supra*, and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, *supra*, were not discussed therein. Rather, the opinion cited the operating rule relied upon by CSX, found it granted complete discretion to the carrier in determining whether train

orders would be used, and took issue with the Board's findings, agreeing with the district court that the Board decided the *need* for flagging, rather than whether flagmen were being used. App. at 21a-23a.

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### REASONS FOR GRANTING THE WRIT

- I. THIS CASE PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE THE DECISION BELOW IGNORES THE TERMS, PURPOSES, AND LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT, WHICH PROMOTE THE EFFECTIVENESS OF ARBITRATION BOARDS BY MAKING THEIR DECISIONS FINAL AND BINDING, KEEPING THEM OUT OF THE COURTS, MADE CLEAR BY THE COURT IN *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978).

The final decision of the court of appeals, as a result of its June 19, 1990, Order, fails to properly apply the determinative precedent from this Court on the issue of enforcement or review of Railway Labor Act arbitration awards<sup>2</sup>, *viz.*, *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978), wherein it is clearly stated that the language of Section 3 First(p), 45 U.S.C. §153 First(p), as to the enforceability [and, consequently, limiting the availability of

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<sup>2</sup> The 1966 amendments to Section 3 Second of the Act, 45 U.S.C. §153 Second (80 Stat. 208, 209) permitting creation of special boards of adjustment (or "public law boards," *see, n. 1, supra*) with jurisdiction co-extensive with the Adjustment Board, require conformity to the same procedural standards made applicable to the Adjustment Board by Section 3 First, 45 U.S.C. §153 First. *See, Brotherhood of Ry. and Airline Clerks v. St. Louis-Southwestern Ry.*, 676 F.2d 132, 135 n.2 (5th Cir. 1982).

review with the same standard in 45 U.S.C §153 First(q)] "means what it says." The Court flatly stated therein: "Only upon one or more of these bases may a court set aside an order of the Adjustment Board. . . . The Adjustment Board certainly was acting within its jurisdiction and in conformity with the . . . Act. . . . We have time and again emphasized that this statutory language means just what it says." (*Id.*) (emphasis added).

Further, in *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965), the plaintiff employee was removed from his job as a fireman on the railroad due to reports from the carrier physicians that he was not physically qualified. The Adjustment Board reinstated the plaintiff with back pay after appointing a panel of doctors who found him qualified. The Board construed his contract to require continued employment while physically fit. When the railroad refused to comply and the plaintiff sued for enforcement under 45 U.S.C. §153 First(p), the district court refused to grant relief, holding the award erroneous, and the Ninth Circuit affirmed. *See*, 336 F.2d 543 (9th Cir. 1964).

Justice Black, writing for the majority, took a dim view of the lower courts' refusal to enforce the award stating:

The District Court found nothing in the agreements restricting the railroad's right to remove its employees for physical disability upon good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went well beyond their province in rejecting the

Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out, Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this. . . . This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. 382 U.S. at 261-63 (emphasis added).

In its final decision as embodied in the June 19, 1990 Order, the court of appeals here essentially held there was no restriction in the agreement or practices prohibiting CSX from deciding when flagging was to be performed, which is very similar to the holding of the Ninth Circuit in *Gunther, supra*, prior to reversal of its decision by the Court. But the finding of the Board that "flagging was essentially being performed" cannot be said to be wholly baseless and completely without reason. Congress chose arbitration boards, not the courts, to decide these questions, as the Court in *Gunther, supra*, and *Sheehan, supra*, make clear beyond peradventure.

It has been clearly held that the Adjustment Board and Public Law Boards do not lack jurisdiction to misinterpret the bargaining agreement or practices. See, *Hill v. Norfolk & Western Ry., supra*; *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157 (2d Cir. 1979), cert. denied, 449 U.S. 854 (1980). Further, where the claim is that the Board exceeded the scope of its jurisdiction, the issue "is not whether the reviewing court agrees with the Board's

interpretation of the bargaining contract, but whether the remedy fashioned is rationally explainable as a logical means of furthering the aims of the contract." *See, e.g., Walsh v. Union Pacific R.R.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 482 U.S. 928 (1978).

Here the claim of the respondent CSX is not that a term of the collective bargaining agreement was violated, but rather that its own unilaterally promulgated rule regarding the circumstances under which it could operate by train order was misconstrued. What makes this assertion truly ludicrous is that CSX frankly admitted to the Board, as noted by the district court, that if flagging is performed, employees represented by UTU are entitled to the work under the existing practices on the property. App. at 28a-29a.

Perhaps Judge Posner best summarized the Court's views on the question in the opinion in *Hill v. Norfolk & Western Ry.*, 814 F.2d at 1194-95, in stating:

As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award — whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act — is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. . . . If they did, their interpretation is conclusive. By making a contract with an arbitration clause the parties agree to be bound by the arbitrators' interpretation of the contract. A party can complain if the arbitrators don't interpret the contract — that is, if they disregard the contract and

implement their own notions of what is reasonable or fair. A party can complain if the arbitrators' decision is infected by fraud or other corruption, or if it orders an illegal act. But a party will not be heard to complain merely because the arbitrators' interpretation is a misinterpretation. Granted, the grosser the apparent misinterpretation, the likelier it is that the arbitrators weren't interpreting the contract at all. But once the court is satisfied that they were interpreting the contract, judicial review is at an end, provided there is no fraud or corruption and the arbitrators haven't ordered anyone to do an illegal act. (Citations omitted).<sup>3</sup>

Moreover, the question here is one of exceptional importance in light of the Court's recent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. \_\_\_, 105 L.Ed. 2d 250 (1989). In that case, it was held that a rail carrier's position of an implied agreement to institute changes in a drug testing program was "not

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<sup>3</sup> Remarkably, a panel the court of appeals itself, including one of the judges in the majority here, recently upheld an arbitrator's award reinstating an employee who drank beer at dinner before returning to work, which displeased it greatly. See, *Dixie Warehouse and Cartage Co. v. General Drivers, Warehousemen and Helpers, Local Union No. 89*, \_\_\_ F.2d \_\_\_ 133 LRRM 2942 (6th Cir. 1990). In that case, the court of appeals applied what amounts to the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, ("NLRA") analogue to *Union Pacific R.R. v. Sheehan*, *supra*, contained in the Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), explaining that an arbitrator [under the NLRA] has the authority to review penalties unless prohibited by the agreement, making the final decision herein all the more incomprehensible.

obviously insubstantial," and therefore, a "minor dispute" under the Act subject to mandatory arbitration, ousting the courts of jurisdiction. 491 U.S. at \_\_\_, 105 L.Ed. 2d at 267, 272. But the Court clearly left the resolution of the carrier's entitlement to continue the practice to the Board. *Id.* at 272.

The holding of *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, *supra*, loses all effect if courts are permitted to determine matters within the *exclusive* jurisdiction of the Board by effectively deciding the issues *de novo* based on an analysis of what issue the Board actually decided "reading the award as a whole," rather than dealing with the statutorily *conclusive* findings of the Board. As the Court noted in *Union Pacific R.R. v. Sheehan*, *supra*, "[n]ormally finality [of Board decisions] will work to the benefit of the worker . . . and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. . . ." 439 U.S. at 94. If the final decision of the court of appeals is permitted to stand, the clear Congressional choice of the Board as the exclusive forum for resolution of "minor disputes" will amount to a nullity. As the Court said in *Union Pacific R.R. v. Sheehan*, *supra*, "[C]ongress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts. . . ." 439 U.S. at 93 (citing *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957)).

## II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

A very recent opinion of the Seventh Circuit is but the latest example of decisional conflict fostered by the

final decision of the court of appeals. In *Chicago & North Western Transportation Co. v. United Transportation Union*, \_\_\_ F.2d \_\_\_, 134 LRRM 2607 (7th Cir. 1990), the court rejected a carrier appeal claiming a Public Law Board ignored its rights under an agreement and dispensed its private notions of justice, holding that courts may only decide whether the agreement was interpreted, not whether the interpretation is correct. In this case, the Public Law Board found that "flagging was essentially being performed" or to that effect, and CSX admits that if flagging is performed the work belongs to the UTU's members. Yet the court of appeals here, unlike the Seventh Circuit, permitted the district court to review the matter *de novo* and hold that "reading the award as a whole," the finding was directed at the "need for flagging." That is directly at odds with both 45 U.S.C. §153 First(p) and 45 U.S.C. §153 First(q), which clearly state that the findings of the Board are conclusive.

The extent of the conflict among the courts of appeals manifested by the decision of the court of appeals is also evident in decisions of other circuits referred to hereinabove, e.g., *Walsh v. Union Pacific R.R.*, *supra*, wherein the Eighth Circuit held that where the issue is whether a Board acted within its jurisdiction, the question "is not whether the reviewing court agrees with the board's interpretation of the bargaining contract, but whether the remedy fashioned is rationally explainable as a means of furthering the aims of the contract." 803 F.2d at 441; *see also, Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970) (same). The court of appeals' reliance on the Fourth Circuit's decision in an NLRA arbitration context in *Clinchfield Coal Co. v. District 28*,

*United Mine Workers of America & Local Union No. 1452*, 720 F.2d 1365, 1369 (4th Cir. 1983) ("Where . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract") only emphasizes the conflict.

Certiorari should be granted to resolve the apparent conflicting interpretations of the courts of appeals concerning reviewability of Board awards where the claim is extrajurisdictional action because the mergers of rail carriers that have occurred in recent times have created very large railroad systems, such as respondent CSX, in many instances straddling a number of circuit court boundaries. These conflicting rulings could easily result in the same agreements or practices being interpreted in different ways in different circuits. *See, St. Louis-Southwestern Ry. v. Brotherhood of Ry. and Airline Clerks*, 484 U.S. 907 (1987) (White, J., with whom Brennan, J. joined, dissenting from denial of certiorari).

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<sup>4</sup> As the Court has consistently stated, a collective bargaining agreement (or practice) are not ordinary contracts, nor are they governed by the same old common-law concepts which control private contracts. They cover the whole employment relationship and call into being a new common law - the common law of a particular industry or plant. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, supra*, 491 U.S. at \_\_\_, 105 L.Ed. 2d at 266.

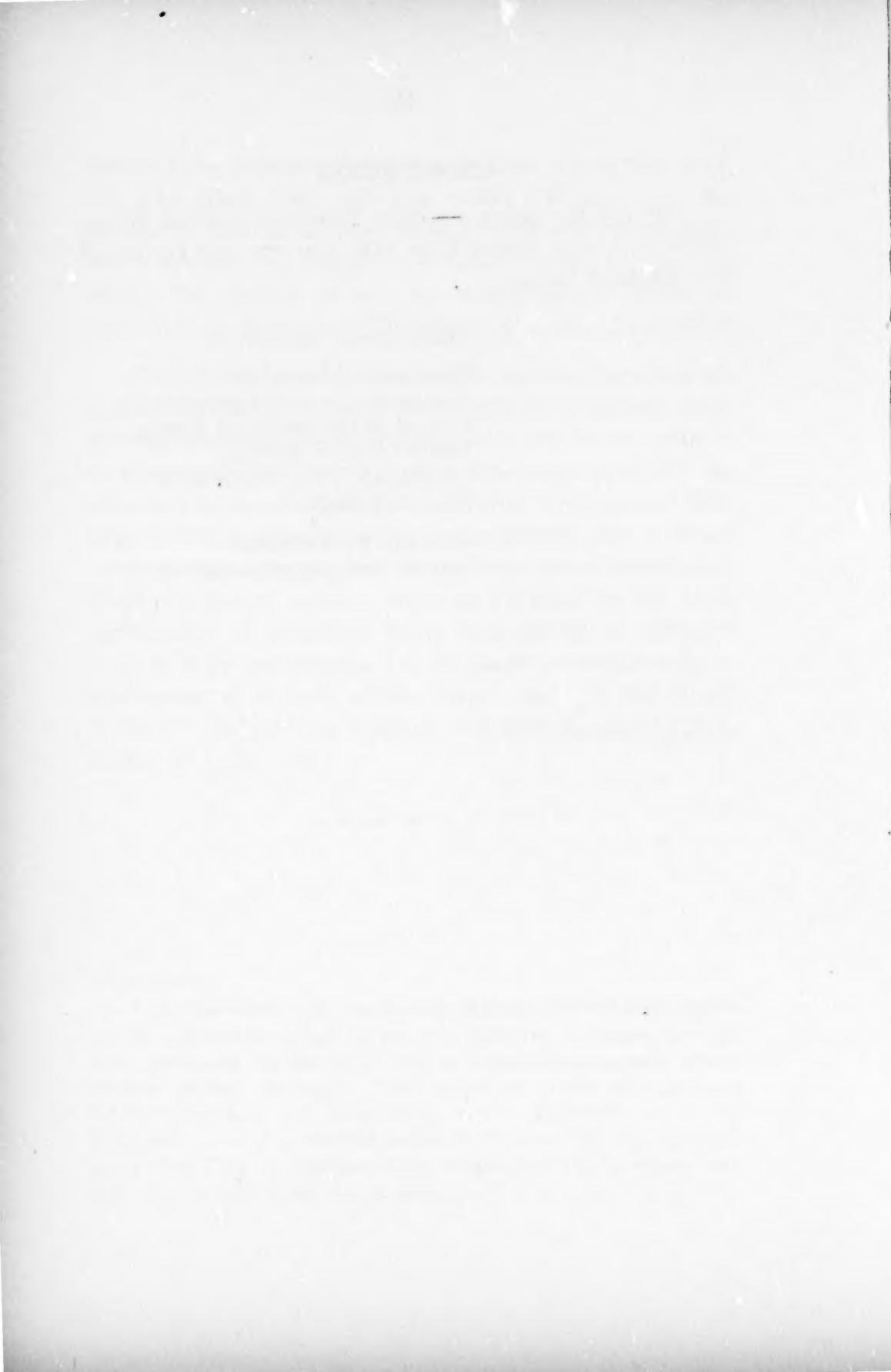
## CONCLUSION

For the foregoing reasons, Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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NO. 89-3344  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION  
UNION,

Petitioner-Appellant,

ORDER

v.

FILED  
JUN 19 1990

CSX TRANSPORTATION, INC.

Respondent-Appellee.

---

BEFORE: KENNEDY and GUY, Circuit Judges; and  
LIVELY, Senior Circuit Judge.

The Court has received the respondent-appellee's motion to amend judgment to conform to opinions or, in the alternative, petition for rehearing and suggestion for rehearing en banc. Upon consideration of the motion, the Court concludes that it is well taken. Accordingly, the previously filed opinions are amended as follows:

(1) The opinion of Senior Judge Lively is amended by deleting the last two lines thereof, which read: "The judgment of the district court is reversed and the case is remanded with directions to enter judgment enforcing the awards."

(2) Circuit Judge Kennedy's opinion is amended by adding at the end of the opinion the following: "Judge Guy having concurred in my dissent to part III of Judge Lively's opinion, it becomes the opinion of the court.

Accordingly, the judgment of the District Court is affirmed."

Entered by order of the Court.

/s/ Leonard Green  
Clerk

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No. 89-3344UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION,	)	
Petitioner-Appellant,	)	ORDER
v.	)	FILED
CSX TRANSPORTATION COMPANY,	)	AUG 02 1990
Respondent-Appellee.	)	

BEFORE: KENNEDY and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE  
COURT

/s/ Leonard Green  
Leonard Green, Clerk

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NO. 89-3344

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
NOT RECOMMENDED FOR FULL  
TEXT PUBLICATION

UNITED TRANSPORTATION UNION,  
Petitioner-Appellant,  
v.  
CSX TRANSPORTATION, INC.  
Respondent-Appellee.

APPEAL FROM THE  
UNITED STATES  
DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT  
OF OHIO  
EASTERN DIVISION

FILED  
APR 26 1990

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Decided and Filed \_\_\_\_\_

BEFORE: KENNEDY and GUY, Circuit Judges; and  
LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. This is an appeal from an order of the district court vacating two awards of a Public Law Board created by agreement of the carrier, CSX Transportation, Inc. (CSX), and the United Transportation Union (UTU), pursuant to the Railway Labor Act. 45 U.S.C. § 151, *et seq.* (the Act). CSX and UTU are parties to a collective bargaining agreement that governs rates of pay, rules and working conditions of employees who work as conductors and trainmen in the CSX system.

I.

A.

This dispute arose from the way in which CSX decided to control rail traffic through areas where

construction work was being done adjacent to track traveled by CSX trains. In two cases, termed the Akron dispute and the Cumberland dispute, CSX chose to control rail traffic through the construction areas by utilizing "train orders" and "proceed signals." A train order is a written notice that requires an engineer to stop the train at a designated location and either proceed through after making a visual observation of the area or wait until the train receives a yellow hand signal or an oral instruction to proceed from an employee at the work site. These proceed signals by hand and oral instructions are presently given by non-UTU represented maintenance of way employees. CSX contends that it has used train orders/proceed signals since the 1960's when these procedures were first formulated.

CSX chose to rely on train orders and hand signals at the times in question in lieu of a technique known as "flagging." Flagging requires that an employee be positioned in such a way as to stop oncoming trains by signalling them to stop with a flag. Pursuant to the collective bargaining agreement flagging must be performed by UTU-represented employees.

UTU challenged CSX's decision to employ alternate techniques to flagging at both Akron and Cumberland by filing grievances claiming that the methods used amounted to flagging and that therefore the work properly belonged to UTU-represented employees. CSX denied both claims. UTU responded by seeking arbitration of the two disputes.

## B.

The parties agreed that UTU's claims should be heard by Public Law Board 3290 (the Board), which was established by agreement in 1982. The Board was created as an alternative to the National Railroad Adjustment Board pursuant to 45 U.S.C. § 153 Second. The agreement creating the Board states that this body "shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules." The agreement also provides that the Board shall consist of three members - a member affiliated with UTU, a member affiliated with CSX, and a neutral member.

The Akron and Cumberland disputes were treated as companion cases by the Board. Pre-hearing submissions were filed and evidence and argument were presented at a hearing before PLB 3290 on May 9, 1985. UTU argued that the actions undertaken by CSX at both sites amounted to flagging. CSX attempted to show that it had long utilized train orders to control rail traffic in lieu of flagging.

The Board found in favor of the union in both cases. As to the Akron case the Board found that "a flagging service was both needed and essentially being performed. . . ." The Board's primary focus in this case might arguably appear to have centered around the need for flagging. The Board concluded that it "appears to be conceded that if flag protection was necessary that train service employees represented by the Organization [UTU] should have been called for that work." The Board

found for UTU on this basis. In the Cumberland dispute the Board again found that flagging was both needed and essentially being performed. This time the primary focus appears to have been on the question of whether the actions of CSX amounted to flagging. The Board found that trains in this area were being compelled to stop by train orders and then signaled through by either radio or hand signals. The Board found that this process was equivalent to flagging and thus once again held for the union. The Board's findings were issued after an Executive Session held on May 11, 1987. However, the Board dated its two decisions January 31, 1987.

### C.

CSX failed to comply with the awards issued by the Board and UTU filed suit to enforce them. CSX filed a counterclaim seeking to have the awards set aside. Both sides then filed motions for summary judgment. The district court granted CSX's motion and denied UTU's motion for summary judgment, and entered an order setting both awards aside.

CSX had claimed for the purposes of summary judgment that the Board's decision should be set aside both for failure to comply with the procedural requisites of the Railway Labor Act and for failure of the awards to conform or confine themselves to matters within the scope of the Board's jurisdiction. The court decided the case on the latter ground - the issue of the Board's conformance with the jurisdiction granted it under the relevant agreement. The court noted in a memorandum opinion that the Board does not have "jurisdiction of disputes growing

out of requests for changes in rates of pay, rules, or working conditions nor have authority to change existing agreements or establish new rules." The court went on to write that the Board accordingly "is not empowered to establish new rules for flag protection of trains passing through construction sites. . . ." Because the Board concerned itself with whether and when flagging protection is necessary it had impermissibly usurped "management's right to determine how its trains should be operated and protected." The district court vacated both awards on this basis.

On appeal UTU argues that the district court committed reversible error in vacating the awards on the ground that the Board had acted outside the scope of its jurisdiction, because "the awards are rationally explainable as a means of furthering the aims of the contract."

## II.

### A.

In providing for judicial review of Board awards Congress prescribed a very narrow scope of review. The Act directs that "[o]n such review, the findings and order of the [Board] shall be conclusive on the parties, except that the order . . . may be set aside, in whole or in part, or remanded . . . for failure of the [Board] to comply with the requirements of [the Act], for failure of the order to conform, or confine itself, to matters within the scope of [its] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C. § 153 First(q).

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 93 (1978), the Supreme Court stated that it has "time and again emphasized that this statutory language means just what it says." A court may set aside a board order only upon one or more of the bases set forth in the statute. In *Sheehan* the court explained the underlying purpose of the Act:

In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. See *Gunther v. San Diego & A. E. R. Co.*, *supra*; *Union Pacific R. Co. v. Price*, *supra*; *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co. v. Price*, *supra*, at 611; *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661, 664 (1946). Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. *Trainmen v. Chicago, R. & I. R. Co.*, 353 U.S. 30, 40 (1957). The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

*Id.* at 94.

In *Gunther v. San Diego & Arizona E. Ry. Co.*, 382 U.S. 257 (1965), the district court refused to enforce an award upon finding no express or implied provisions in the collective bargaining agreement that limited in any way

what the court found to be the railroad's absolute right to remove an employee from service upon certification by the railroad's doctors that the employee was physically disqualified for active service. The court of appeals affirmed. Emphasizing congressional intent that a board's decision in cases involving "minor" disputes be final, the Supreme Court reversed because of the district court's refusal to accept the board's interpretation of the contract. The Court stated:

Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement.

*Id.* at 261.

More recently the Court has written:

"A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. . . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant.' "

*Consolidated Rail v. Railway Labor Exec. Ass'n*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2477, 2485 (1989) (citation omitted). A board decision has the same finality as the decision of an arbitrator. *Gunther*, 382 U.S. at 263. This court has stated that in reviewing an arbitrator's award, a court's duty is "to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement." *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, Etc.*, 594 F.2d 575, 579 (6th Cir.), cert. denied, 444 U.S. 840 (1979).

## B.

The district court found that the Board erred by failing to confine itself to matters within its jurisdiction - the second statutory ground for setting aside an award. The court reached this conclusion on its reading the decision as a determination by the Board that flagging was necessary at the two construction sites. Since the collective bargaining agreement gave CSX the exclusive authority to determine what control mechanism should be employed at construction sites, the court found that the Board had usurped the railroad's right to determine how its trains are to be operated and protected.

CSX contends that the district court clearly acted within its authority in setting these awards aside. The railroad had followed a practice for many years of using train orders to protect obstructed tracks without flagging and had controlled the movement of trains through construction sites by train orders and proceed signals without assigning a flagman to stop the train. Furthermore, the railroad points out that an operating rule (No. 707(f))

expressly permits control of such train movements by use of train orders and proceed signals by non-UTU personnel without flag protection.

CSX argues that the awards in this case "cannot be rationally deduced from the agreement," quoting *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012, 1015 (6th Cir. 1973), and are not "logically derived" from any provision of the agreement, paraphrasing, *Schneider v. Southern Railway Co*, 822 F.2d 22, 24 (6th Cir. 1987). In *Timken*, this court upheld the district court's refusal to enforce an arbitrator's award because the arbitrator refused to apply a definition contained in the collective bargaining agreement and went outside the record to find a definition that supported his decision. Thus, the arbitrator did not draw the essence of the award from the bargaining agreement.

In *Schneider* we affirmed the district court order enforcing a public law board's award, upon the court's finding that the board's decision "was not without foundation in reason or in fact." 822 F.2d at 25. Recognizing an "extremely limited" scope of review, we stated:

In order to set aside the Board's decision, it would be necessary to determine that the decision was "wholly baseless and without foundation and reason." (Quoting *Gunther*, 382 U.S. at 264).

*Id.* at 24.

CSX also relies on our decision in *Sears, Roebuck & Co., v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982), cert. denied, 460 U.S. 1023 (1983). In *Sears* the district court vacated an arbitrator's award upon finding

that the arbitrator had refused to apply unambiguous language in the collective bargaining agreement and had applied a "balancing test" instead. *Id.* at 155.

UTU argues that under the guise of a claim that the Board acted outside of its jurisdiction, CSX actually disputes the conclusive finding of the Board that the railroad's procedures at the construction sites were the equivalent of flagging. It maintains that the district court conducted a *de novo* review of the facts and made findings directly contrary to those of the Board. Such a procedure is not permitted, and findings of the district court that contradict those of the Board cannot be sustained.

UTU contends that the district court in the present case violated the rule that "in determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts resolved in favor of the arbitrator's award." *Walsh v. Union Pacific Railroad Co.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 452 U.S. 928 (1987). The district court recognized that the Board has found that flagging was essentially being performed at the construction sites, but then stated, "[h]owever, the award read as a whole indicates that the focus was on the *need* for flagging as opposed to its use, and, as noted, there was no evidence that flagging was actually performed by anyone." (Italics in original). This finding, according to UTU, clearly exceeded the district court's scope of review.

### III.

We agree with UTU that the district court failed to accord the required deference to the Board's findings. The

Board found that the procedures being followed were the equivalent of flagging and that flagging was essentially being performed. Rather than accepting this finding as conclusive, the district court found from reading the award as a whole that the "focus" of the Board was on the need for flagging rather than on its actual use. Such an approach to an arbitrator's award is directly contrary to the rule that it "must be broadly construed with all doubts resolved in favor of" the award.

Read indulgently, the award does not state that the Board found that there was a need for flagging at the construction sites. Rather, it can be read to state that the actions of CSX indicated that the railroad found a need for flagging and followed procedures that were the equivalent of flagging. Thus read the award did not rewrite the collective bargaining agreement or impose a new rule requiring flagging through all construction sites. It merely found that under all the circumstances disclosed by the record, flagging in fact, if not in name, was being performed, and UTU employees were not being used.

We are not persuaded by CSX's arguments that it followed procedures which conformed with past practices and were provided for in its operating rules. Rule 707(f) does not provide an alternate to flagging in all circumstances and under all conditions. It states, "When conditions will not permit turning the track over to Work Force(s) . . . or if the nature of the work may cause equipment to foul adjacent tracks, work by Work Force(s) may be performed under traffic without flag protection by use of a train order." This language clearly indicates

that alternative procedures may be substituted for flagging only if certain conditions are met. If these conditions are not met the fact that train orders are used does not eliminate the requirement that flag protection be provided.

The Board found that in the circumstances shown by the evidence in the Cumberland and Akron cases, use of train orders pursuant to Rule 707(f) and applying Operating Rule 93 to control train movements resulted in procedures that were equivalent to, or essentially, flagging. Under different circumstances a different board might well find that use of similar orders and procedures are not the equivalent of flagging. That is a factual determination for each board to whom a dispute is submitted, and as such, it is not subject to the sort of scrutiny applied by the district court in the present case.

The Board did not exceed its jurisdiction by committing the type of errors that led to vacating the awards in *Timken* and *Sears*. On the contrary, the awards draw their essence from the agreement, are rationally explainable, and further a purpose of the agreement – preserving to UTU members the right to be used whenever flagging is employed.

#### IV.

CSX makes two additional arguments. First, it complains that the Board "did not even prepare the proposed awards for 20 months and the awards were not finally issued until after an executive session was held on May 11, 1987, more than two years after the arbitral hearing closed." Second, CSX contends that the Brotherhood of

Maintenance of Way Employees (BMWE) should have been notified of the proceedings before the Board because BMWE employees performed the contested work (yellow hand signals and oral proceed orders) and would be affected by any decision made by the Board.

A.

CSX relies upon *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257 (6th Cir. 1984), in which we held that a board lost jurisdiction over a case by delaying its decision until some 14 months after completion of hearing. The agreement under which the matter was submitted to the board contained a 15-day limit for rendering awards. This court held that the 15-day provision was not jurisdictional in the absence of an explicit statement that the board would lose jurisdiction if it failed to comply with the time limit. The court determined that in the absence of such an explicit statement, " 'the authority of the arbitrator will expire after a reasonable time beyond the period originally fixed for the award has gone by.' " *Id.* at 265, quoting *Local Union 560, International Brotherhood of Teamsters v. Anchor Motor Freight*, 415 F.2d 220, 226 (3d Cir. 1969). The court then held that the board in *Jones* had lost jurisdiction by reason of the 14-month delay, which was found to be clearly unreasonable.

It is possible for a party to waive a time requirement by failing to object to a board's delay in rendering its decision. The *Jones* opinion notes the rule followed by the Second Circuit that "a court should always have the discretion to uphold a late award when no objection to the delay has been made prior to the rendition of the

award or there is no showing that harm was caused by the delay." *Id.* at 265-66, citing *West Rock Lodge No. 2120 v. Geometric Tool Company*, 406 F.2d 284 (2d Cir. 1968). There was no waiver in *Jones* because, as the court found, the grievant had made repeated efforts to have the board issue its decision during the period of delay. Treating these efforts as objections to the board's delay, the court found that the delay harmed the grievant's case. Thus, the party seeking to overturn the award did not waive the 15-day requirement.

This court also considered a delayed board decision in *Schneider*, 822 F.2d at 22 (6th Cir. 1987). In that case the parties had modified the agreement orally to substitute "within a reasonable time" for "thirty days." The court found that the railroad and the union had acquiesced in the slow pace of the board in rendering awards in 512 cases over a 13-year period. Many of these awards were made more than nine months after hearings – the time involved in Schneider's case. Under these circumstances the district court "wisely stayed its hand" and accepted the parties' evident interpretation of reasonableness. *Id.* at 25.

CSX made no objection to the Board's delay in rendering its decision. Thus, *Jones* is distinguishable. See *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1199 (7th Cir. 1987). In adopting the rule of reasonableness in *Jones*, this court stated:

The determination of reasonableness must be made giving consideration to the surrounding circumstances and any element of prejudice or harm either party suffers. This rule of reasonableness developed to prohibit parties from

waiting until an award is made and objecting to it on the basis of its untimeliness *only after* they receive an unfavorable decision.

728 F.2d at 265 (citation omitted) (italics in original).

CSX did exactly what *Jones* held the rule of reasonableness was designed to prevent. It voiced no objection to the Board's delay until after the Board rendered its unfavorable decision. Now it makes totally unsubstantial claims of harm by reason of the delay. Under the circumstances of this case we conclude that the Board did not lose jurisdiction over the matter by reason of its delay in rendering a decision.

## B.

The Act requires boards to give "due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." 45 U.S.C. § 153 First(j). The court stated in *Meeks v. Illinois Central Gulf Railroad*, 738 F.2d 748, 751 (6th Cir. 1984), quoting *Allain v. Tummon*, 212 F.2d 32, 35 (7th Cir. 1954), "It is 'well established that an award made by the board in the absence of due notice to the involved parties is void.'" In *Meeks* the board notified the union, but failed to notify the aggrieved employee. In the present case both the aggrieved employees and the union were notified of the hearing and participated. The question is whether the award is void because another union, whose members had given hand and oral proceed signals to trains controlled by train orders, was not notified.

"Involved parties" has been construed to mean parties "likely to be harmed or substantially affected by the

result of the hearing." *Brotherhood of Railway, Airline and Steamship Clerks v. St. Louis Southwestern Railway Co.*, 676 F.2d 132, 135 (5th Cir. 1982). The BMWE does not fit this description. The UTU employees did not seek to replace BMWE employees. The maintenance of way workers were at the construction sites for other purposes, and their occasional "flagging" activities were incidental to their primary occupations. The UTU employees contended that they should have been assigned to the sites for flagging only, not to replace BMWE workers.

Even if the BMWE can be considered an involved party, the failure to notify that union of the proceedings did not necessarily render the awards void. The court held in *Brotherhood of Railway, Airline and Steamship Clerks* that failure to notify a third-party union was a procedural error that did not necessarily void the award. 676 F.2d at 136. In that case the third-party union never objected and the railroad objected only in the court review proceedings "putatively on behalf of the [other union], after making no such objection throughout the regular proceedings under the statute." *Id.* at 137. This court cited *Brotherhood of Clerks* in support of the statement in *Schneider*: "It is well-established that parties to an arbitration may waive procedural defects by failing to bring such issues to the arbitrator's attention in time to allow the arbitrator an opportunity to cure the defects." 822 F.2d at 24. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952) (a procedural objection that was clearly an afterthought not permitted to undo administrative proceedings). We do not believe the absolute *Meeks* rule applies to void arbitration proceedings when the party not notified is neither the grievant, his union or the

railroad, and a favorable award will not result in displacing other employees.

Here, neither CSX nor BMWE ever objected to the failure to notify BMWE. Since an award in favor of the UTU employees would not cause displacement of BMWE-represented employees, this procedural error was waived.

The judgment of the district court is reversed and the case is remanded with directions to enter judgment enforcing the awards.

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No. 89-3344  
*United Transportation Union v.*  
*CSX Transportation, Inc.*

KENNEDY, Circuit Judge, dissenting.

I do not disagree with the majority's legal analysis, but rather with the conclusion that the Board confined itself to matters within its jurisdiction. The jurisdiction of the Board is determined by the arbitration agreement between the parties because the "major objective of the Railway Labor Act was to avoid industrial strife by submitting disputes to the adjustment boards for arbitration. The special boards' jurisdiction is limited to the jurisdiction that is conferred thereupon by the agreement between the carrier and the union." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 264 (6th Cir. 1984). The agreement between appellee CSX Transportation, Inc. (CSX) and appellant United Transportation Union (UTU) set out three areas for which the Board would not have

jurisdiction: "The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules."

As the majority acknowledges, the collective bargaining agreement gave CSX the exclusive authority to determine which control mechanism should be employed at the construction sites.<sup>1</sup> For many, many years CSX had used train orders and proceed signals at some construction sites.

Operating Rule 707(f) provides:

When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and 707(d), or if the nature of the work may cause equipment to foul adjacent tracks, *work by Work Force(s) may be performed under traffic without flag protection by use of a train order*. During the time specified in the train order, all trains will move within the work limits prepared to stop within one-half the range of vision and not proceed beyond the point of work except on yellow hand proceed signal or oral authority from employee in charge of work.

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<sup>1</sup> The majority says that the agreement did not give unqualified discretion to CSX because "Rule 707(f) does not provide an alternative to flagging in all circumstances and under all conditions." It then concludes that if those conditions are not met, use of train orders does not eliminate the requirement for flagging protection. It is important to note, however, that in neither the Cumberland suit nor in the Akron suit was the existence of conditions giving CSX discretion ever contested by the union.

Joint App. at 42 (emphasis added). This rule clearly indicates a difference between the use of a train order and the use of flagmen to protect workers at a construction site. The choice of which to use is vested with CSX. CSX chose to issue a train order under this rule for trains at the Cumberland construction site. It also issued a Superintendent's Bulletin for the Akron construction site under Operating Rule 93, which provides that "[w]ithin yard limits, trains and engines . . . must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication." Joint App. at 45. Thus, at both sites the trains were required to stop before proceeding either at the direction of a block signal indication or by hand signal or oral authority. In both situations, CSX made the decision not to use flag protection, but rather to protect workers by requiring trains to stop before proceeding or to otherwise verify that the tracks were clear.

It is axiomatic in cases such as this that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (quoted in *Norfolk & Western Ry. Co. v. Brotherhood of Ry., Airline and Steamship Clerks*, 657 F.2d 596, 600 (4th Cir. 1981)). Moreover, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

Examining the Board's opinions in the two cases makes it clear that it decided in appellant's favor not by interpreting the agreement and applicable "shop law," but rather by deciding that flagging was necessary at both sites and that CSX should used the claimants. It is telling to note that the Board framed the question as follows:

The issue here in dispute, as we view it, concerns more the contention of the Organization [UTU] that there was a need for flag protection at the construction site regardless of the type of mechanical equipment or cranes being used by the contractor and that the Claimant or Claimants should have been called for such work.

Joint App. at 13 (emphasis added). The Board thus decided the *need* for flagging, not simply whether non-UTU flagmen were being used.<sup>2</sup> The Board found that the "circumstances of [the] record support the conclusion that a flagging service was both needed and essentially being performed outside the scope of the recognized duties of train service employees." *Id.* As noted above, however, deciding the need for flagmen is vested with the discretion of CSX. *Timken Co. v. Local Union No. 1123, United Steelworkers of America, AFL-CIO*, 482 F.2d 1012, 1015 n.2 (6th Cir. 1973) held that "if the arbitrator under[takes] to, in effect, . . . substitute his own discretion for that of the parties or to dispense 'his own brand

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<sup>2</sup> Both parties concede that if flagmen were being used at the sites, the claimants would be entitled to their awards. I would emphasize that the relevant question for the Board was whether flagmen *were* used, not whether they *should have been* used.

of industrial justice,' the enforcement of the award must be denied" (citation omitted). Here, the Board substituted its discretion with regard to the need for flagmen for that of CSX. As in *Timken*, the Board acted without jurisdiction by exceeding the scope of the arbitration agreement.

While I recognize that interpretation of the arbitration agreement is the unique function of the Board and that its interpretation should not be easily set aside by a reviewing court, the fact that the Board failed to consider either the contract language or the "law of the shop" here expressed in written rules which vested authority with CSX to determine whether to use flagmen or issue train orders at construction sites, is a decision outside its scope of authority. Not only does it not draw its essence from the contract, but it also serves to change a substantive rule regarding flag protection - that is, that CSX no longer has discretion to choose the means of protecting workers. "This Court has consistently adhered to the principle that an arbitrator may construe ambiguous contract language, but lacks authority to disregard . . . plain or unambiguous contract provisions." *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 155 (6th Cir. 1982). See also *Clinchfield Coal Co. v. District 28, United Mine Workers of America & Local Union No. 1452*, 720 F.2d 1365, 1369 (4th Cir. 1983) ("Where . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract").

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I would AFFIRM the judgment of the District Court.

**No. 89-3344**  
**United Transportation Union v. CSX**  
**Transportation, Inc.**

**GUY, Circuit Judge.** I concur in parts I, II, and IV of Judge Lively's opinion, but I dissent from part III and join with Judge Kennedy's resolution of that issue. I believe, as Judge Kennedy concluded, that the Board actually decided the need for flagging rather than the question that was properly before them.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED TRANSPORTATION UNION,	)	CASE NO.
	)	C87-1986
	)	Judge
Petitioner,	)	John M. Manos
v.	)	MEMORANDUM
CSX TRANSPORTATION, INC.,	)	OF OPINION
	)	FILED
	)	MAR 20
Respondent.	)	9 53 AM 89

On July 31, 1987, United Transportation Union ("UTU"), petitioner, filed the above-captioned petition against CSX Transportation, Inc. ("CSX"), respondent, seeking enforcement of two awards made by a Public Law Board convened pursuant to 45 U.S.C. § 153 Second. On September 23, 1987, CSX filed a counterclaim seeking to have the awards set aside. Jurisdiction is proper pursuant to 28 U.S.C. § 1331. The case is before the court on each party's motion for summary judgment pursuant to Fed. R. Civ. P. 56. CSX's motion is granted; UTU's, denied, and the awards are vacated.

## I.

On November 2, 1982, UTU and CSX's predecessor agreed to establish a special adjustment board pursuant to 45 U.S.C. § 153 Second, which became known as Public Law Board No. 3290 ("Board"). Such a board is a voluntary creation of railroad carriers and their employees, and is established for the purpose of adjusting and deciding

disputes that cannot be resolved through the usual internal dispute resolution mechanisms. The Board consisted of three members: one representative each of CSX and UTU, and one neutral member.

Awards number 120 and 121 were rendered by the Board in favor of UTU, which represented Yard Foreman R.L. Corley and Brakeman D.R. Kile in each claim, respectively. The awards sustain CSX's obligation to pay each because each should have been, but was not, called to work as a flagman at separate construction sites.

#### AWARD 120: THE AKRON DISPUTE

Beginning in November 1981, the City of Akron engaged a contractor to rebuild an overhead highway bridge under which CSX's railroad trains passed. CSX issued a Superintendent's Bulletin pursuant to Operating Rule 93<sup>1</sup> which provided that all trains passing under the bridge must stop and ascertain that the track is clear before proceeding.

R. J. Korley filed a claim for pay, contending that flagging protection was work properly belonging to him. Award Number 120 sustained that claim.

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<sup>1</sup> Operating Rule 93 provides in pertinent part:

Within yard limits, trains and engines (except first class trains) must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication.

**AWARD 121: THE CUMBERLAND DISPUTE**

In July, 1982, in Cumberland, Maryland, repair work was being performed on a trestle under which ran railroad tracks. Scaffolding suspended from the trestle created a potential obstruction to CSX's train movements below the trestle. CSX issued a train order pursuant to Operating Rule 707(f)<sup>2</sup> which required trains to stop before the trestle, unless they were radioed that the track was clear, or given a yellow hand signal to proceed, in which case they would pass under the trestle without stopping.

D.R. Kile filed a claim for pay, contending that flagging protection was work properly belonging to him. Award Number 121 sustained that claim.

**II.**

There is no dispute that CSX has the unilateral authority to dictate the operation and handling of its trains. Likewise, it is conceded that if flagging protection

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<sup>2</sup> Rule 707(f) provides:

When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and (d), or if the nature of the work may cause equipment to foul adjacent tracks, work by Work Force(s) may be performed under traffic without flag protection by use of a train order. During the time specified in the train order, all trains will move within the work limits prepared to stop within one-half the range of vision and not proceed beyond the point of work except on yellow hand proceed signal or oral authority from employee in charge of work.

is afforded any train, it is work within the exclusive jurisdiction of UTU members.

The affected trains in both awards were subject to operating rules which served to stop them before the construction sites, or which served to allow them to proceed if there was no obstruction. There was no evidence that any train had been flagged to a stop or through the sites, except insofar as non-UTU workers might give "yellow hand signal to proceed."

In the Akron dispute, the Board reached the following conclusions:

We believe that circumstances of record support the conclusion that a flagging service was *both needed and essentially being performed outside the scope of the recognized duties of [UTU] employees.* . . .

\* \* \*

It therefore seems evident that a hazardous condition existed at the construction site that required the protection of a flagman.

Petition Ex. 1 at 5 (emphasis added). In the Cumberland dispute, the conclusion was

It does not seem that the issue in dispute turns on a question of whether a train was actually flagged to a halt that should govern whether flagging protection was required or being provided by [non-UTU] employees. . . .

\* \* \*

It seems evident that the trains . . . were subject to being flagged through the construction site,

with the [non-UTU] work force employees permitting trains to proceed by either radio or hand communication signals.

Petition Ex. 2 at 1-2. Thus, the Board decided, in both awards, that CSX ought to have chosen to protect its trains by flagging. Then, over-applying CSX's concession that flagging is work of the UTU, the Board reasoned that each claimant should have been called to flag the site that should have been thus protected.<sup>3</sup>

### III.

When an award of a Public Law Board is rendered, it is "final and binding upon both parties to the dispute. . . . Compliance [is] enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards [rendered under 45 U.S.C. § 153 First]." 45 U.S.C. § 153 Second.

Such awards may only be set aside under § 153 First (p), or set aside or remanded under § 153 First (q), upon three limited grounds: failure to comply with the procedural requisites of the Railway Labor Act, failure of the award to conform or confine itself to matters within the scope of the board's jurisdiction, or fraud or corruption of a board member. The last ground is not alleged. Instead,

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<sup>3</sup> The Board overstated CSX's concession thusly: "It also appears to be conceded that if flag protection was necessary that [UTU] employees . . . should have been called for that work." CSX Motion for Summary Judgment Ex. A. at 6. As shall be shown, the Board was without jurisdiction to decide "if flag protection was necessary." See post at 6.

CSX presses three contentions; one respecting a procedural irregularity and two claiming exceeded jurisdiction. UTU denies that any of the grounds for review are sustainable. Because the court finds that the awards must be set aside on the ground that the Board has exceeded its jurisdiction by imposing operating rules upon CSX, the other contentions of CSX are not addressed.<sup>4</sup>

The decisions of Public Law Boards are to be accorded the same finality as those of arbitrators rendering decisions under collective bargaining agreements. *Gunther v. San Diego & Arizona E. Ry. Co.*, 382 U.S. 257, 263, 86 S. Ct. 368, 372 (1965) (citing *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957)).

"In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction on [sic] the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract."

---

<sup>4</sup> CSX has claimed that the rendering of the awards was so long delayed that the Board lost jurisdiction, and that the Board's failure to notify non-UTU Maintenance of Way workers of the proceedings was a fatal irregularity under the requirements of 45 U.S.C. § 153 First (j). UTU has answered that all the grounds claimed are meritless, and that these two have been waived.

*Schneider v. Southern Ry. Co.*, 822 F.2d 22, 24 (6th Cir. 1987) (quoting *Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 411-12 (5th Cir. 1969), cert. denied, 396 U.S. 1008, 90 S. Ct. 564 (1970)).

— The awards at issue here are not so derived. They "fall within [one] of the three limited categories of review provided for in the Railway Labor Act," *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 93, 49 S. Ct. 399, 402 (1978); that is, they fail to confine themselves to matters within the scope of the Board's jurisdiction. The agreement establishing the Board provides, in pertinent part, that it

shall have jurisdiction only of the claims and grievances . . . arising out of the interpretation of agreements governing rates of pay, rules or working conditions. *The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or working conditions nor have authority to change existing agreements or establish new rules.*

CSX Motion for Summary Judgment Ex. 4 at 1(B) (emphasis added).

The Board is not empowered to establish new rules for flag protection of trains passing through construction sites; that assessment is concededly the exclusive province of CSX. And the Board did not find that CSX had determined the necessity for flag protection. Instead, the Board's decisions are a usurpation of the management's right to determine how its trains should be operated and protected. If CSX decides that flagging is, in the Board's words, "needed" or "required," UTU workers must be assigned the task. If, as happened here, CSX decides that its trains are adequately protected by means other than

flagging, and in fact does not use flagging,<sup>5</sup> the Board has no further say in the matter.

Accordingly, CSX's motion for summary judgment is granted, UTU's is denied, and Public Law Board No. 3290 Award numbers 120 and 121 are vacated.

IT IS SO ORDERED.

/s/ John M. Manos  
UNITED STATES  
DISTRICT JUDGE

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<sup>5</sup> In Award Number 120, the Board did find that flagging was "essentially being performed," *see ante* at 3; however, the award read as a whole indicates that the focus was on the *need* for flagging as opposed to its use, and, as noted, there was no evidence that flagging was actually performed by anyone.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED TRANSPORTATION	)	CASE NO.
UNION,	)	C87-1986
	)	
Petitioner,	)	Judge
	)	John M. Manos
v.	)	ORDER
CSX TRANSPORTATION,	)	FILED
INC.,	)	MAR 20 89
	)	
Respondent.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, CSX Transporation, Inc.'s motion for summary judgment is granted, United Transportation Union's is denied, and Public Law Board No. 3290 Award Numbers 120 and 121 are vacated.

IT IS SO ORDERED.

/s/ John M. Manos  
UNITED STATES DISTRICT  
JUDGE

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(2)  
No. 90-699

Supreme Court, U.S.  
FILED

DEC 3 1990

ROBERT F. SPANGLER, JR.

In the  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1990

**UNITED TRANSPORTATION UNION,**

*Petitioner,*

v.

**CSX TRANSPORTATION, INC.,**

*Respondent.*

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION**

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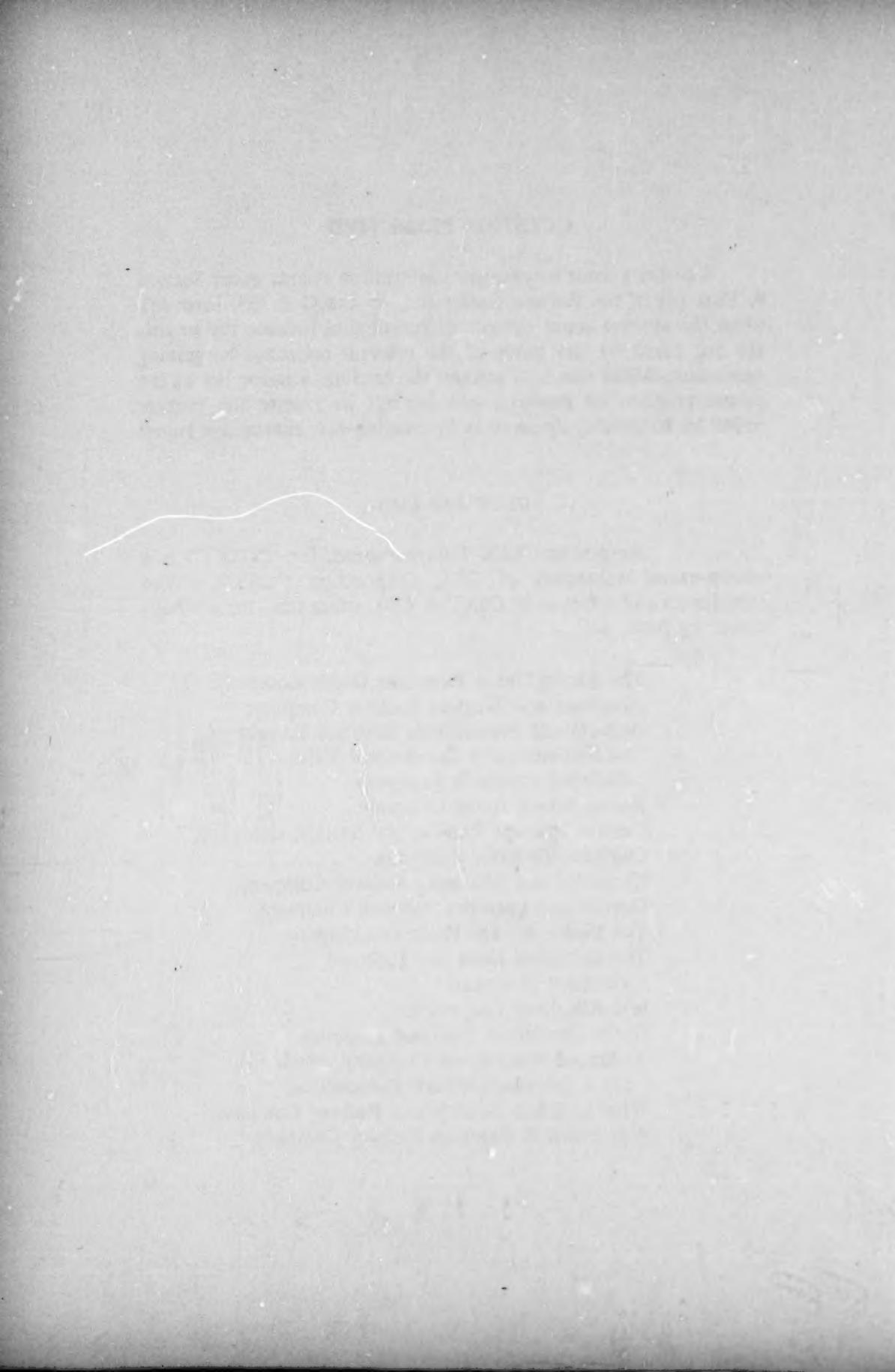
### **QUESTION PRESENTED**

Whether a court may set aside arbitration awards under Section 3, First (q) of the Railway Labor Act, 45 U.S.C. § 153, First (q), when the arbitral board exceeds its jurisdiction because the awards are not based on the terms of the relevant collective bargaining agreement, fail to take into account the existing common law of the particular plant or industry, and attempt to rewrite the parties' collective bargaining agreements by creating new substantive rules?

### **RULE 29.1 LIST**

Respondent CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;  
Allegheny and Western Railway Company;  
Augusta and Summerville Railroad Company;  
The Baltimore and Cumberland Valley  
Railroad Ex~~ec~~ution Company;  
Beaver Street Tower Company;  
Central Transfer Railway and Storage Company;  
Chatham Terminal Company;  
Clearfield and Mahoning Railway Company;  
Dayton and Michigan Railroad Company;  
The Home Avenue Railroad Company;  
The Lakefront Dock and Railroad  
Terminal Company;  
Mid-Allegheny Corporation;  
North Charleston Terminal Company;  
Richmond-Washington Company, which  
has a subsidiary, RF&P Corporation;  
Winston-Salem Southbound Railway Company;  
Woodstock & Blockton Railway Company.



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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1990

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No. 90-699

---

**UNITED TRANSPORTATION UNION,**

*Petitioner,*

v.

**CSX TRANSPORTATION, INC.,**

*Respondent.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union ("UTU") seeking review of the unpublished decision of the United States Court of Appeals for the Sixth Circuit in *United Transp. Union v. CSX Transp., Inc.*, No. 89-3344 (6th Cir. Aug. 2, 1990) [hereinafter cited as "UTU v. CSXT"].

## COUNTERSTATEMENT OF THE CASE

This petition involves the review of Award Nos. 120 and 121 of an arbitration panel, Public Law Board No. 3290 ("PLB 3290"), which was established pursuant to Section 3, Second of the Railway Labor Act ("RLA"), 45 U.S.C. § 153, Second. App. 6a.1/ Awards 120 and 121 involved CSXT's procedures for controlling train movements to ensure safe operations at obstructed or potentially obstructed track sites.2/ Awards 120 and 121 arose from UTU grievances claiming that CSXT had violated its collective bargaining agreement by failing to assign a UTU member to provide "flagging" protection at each of two construction sites located at Akron, Ohio and Cumberland, Maryland, respectively. Flagging is the assignment of an employee to physically flag oncoming trains to stop in advance of the work site. J.A. 317. At the Akron and Cumberland work sites, CSXT used alternative train control procedures set forth in its operating rules involving train orders3/ and (at Cumberland) proceed signals4/ to safely control train

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1/ The Appendix to the Petition for Certiorari is cited herein as "App." The Joint Appendix filed in the Sixth Circuit is cited as "J.A."

2/ Construction and repair of highway and railroad bridges often occurs at locations adjacent to CSXT's tracks where highways, streets or other railroad tracks pass over CSXT's tracks, resulting in potential obstruction of those tracks. CSXT's own track maintenance programs also regularly require restrictions on train movements through such work sites. J.A. 317.

3/ A train order is a written directive that directs and controls the permissible movement of a train by its operating crew. App. 5a; J.A. 41-44.

4/ "Proceed signals" are part of an established alternative procedure for authorizing railroad maintenance of way employees to work at designated locations without flag protection. A train order directs the train crew to stop the train in advance of the protected track site. CSXT maintenance of way  
(continued...)

movements without assignment of any employee to physically flag oncoming trains to stop.

It is undisputed that if CSXT decides to use a flagman at obstructed track sites in order to ensure safe operation of its trains, it is required to use UTU-represented employees to perform the flagging. However, at the time the Akron and Cumberland disputes arose, CSXT had a well-established past practice of more than 12 years duration of controlling and stopping train movements in advance of potential track obstructions without the use of a flagman. For many years CSXT had controlled and stopped train movements at construction or work sites by means of train orders or other operating rules directed to the train crews operating the train. J.A. 317. During the 1960's, CSXT developed specific procedures to protect track work sites which did not utilize flagging, and those past practices were expressly reflected in CSXT's operating rules. J.A. 318-19. The controlling operating rule was Operating Rule 707, entitled "Work Authority to Work Without Flag Protection," which provided, in pertinent part:

707(f) When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and 707(d), or if the nature of the work may cause equipment to foul adjacent tracks, *work by Work Force(s) may be performed under traffic without flag protection by use of a train order*. During the time specified in the train order, all trains will move within the work limits prepared to

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4/ (...continued)

employees at the site, not represented by UTU or subject to the CSXT-UTU collective bargaining agreement, provide the hand proceed signals when the maintenance force concludes that it is safe for trains to proceed through the work site. J.A. 319-20.

stop within one-half the range of vision and not proceed beyond the point of work *except on yellow hand proceed signal or oral authority from employee in charge of work.*

App. 21a, J.A. 319 (emphasis added).<sup>5/</sup> Thus, CSXT's unambiguous operating rules accord CSXT the unilateral right to determine how to control train movements at protected track sites, i.e., to determine whether to use flagging or alternative procedures. These relevant operating rules had become a part of the parties' agreement as a result of undisputed past practices in which UTU had acquiesced. App. 21a-22a.<sup>6/</sup>

Indeed, there is no provision of the CSXT-UTU collective bargaining agreement that requires obstructed railroad track sites to be protected by a flagman. As provided by its operating rules and procedures, when CSXT utilizes a train order to protect a portion of track, no physical flagging of trains to a stop is required or performed. The train order stops the train, not a flagman. Giving yellow hand proceed signals or oral authority to proceed does not constitute flagging of a train. J.A. 319.

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<sup>5/</sup> In addition, Operating Rule 93, which applied to CSXT's main track within yard limits (such as was involved in the Akron dispute) provided that "[w]ithin yard limits, trains and engines must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication." App. 22a.

<sup>6/</sup> These relevant operating rules are no less a part of the agreement because they accord CSXT the right to determine how to control train movements. "Collective bargaining agreements often incorporate express or implied terms that are designed to give management, or the union, a degree of freedom of action within a specified area of activity." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. \_\_\_, 109 S. Ct. 2477, 2483 (1989). The fact that CSXT may at some future time unilaterally change these operating rules is also a past practice acquiesced in by UTU.

Since the specific Rule 707(f) procedure was developed in the 1960s, that procedure has been utilized consistently and repeatedly to control train movements through work sites without assigning UTU-represented employees to give yellow hand proceed signals, to provide oral authority to proceed or to give flagging protection at track locations protected by the applicable train orders. J.A. 319-20. Moreover, notwithstanding CSXT's long-standing practice, the UTU had never filed a grievance claiming that so controlling train movements violated the CSXT-UTU collective bargaining agreement until the claims were filed in the Akron and Cumberland disputes, which involved events in 1981-1982. J.A. 320.

#### Arbitration Proceedings

The parties agreed that the UTU's claims would be heard by PLB 3290. In the agreement establishing PLB 3290, the parties prohibited PLB 3290 from dealing with issues other than those "submitted to it under this agreement," and further limited its jurisdiction as follows:

The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions *nor have authority to change existing agreements or establish new rules.*

App. 6a, 21a; J.A. 163 (emphasis added).

The two UTU grievances were treated as companion cases by PLB 3290. App. 6a. In both disputes, the UTU argued that the use of the alternative operating rule/train

order procedure to protect track sites itself established a need for and was equivalent to providing flag protection.]/

CSXT presented evidence to PLB 3290 of the common and long-standing practices utilizing train orders issued pursuant to operating rules to control train movements through construction sites without the assignment of a flagman. J.A. 323. PLB 3290 was specifically advised of the text of CSXT's relevant operating rules and that CSXT had controlled the movement of CSXT's trains at both work sites by use of operating rule procedures. J.A. 216, 323.

### **The Arbitration Awards**

On May 11, 1987, over 20 months after the close of the arbitration hearing, PLB 3290 issued Awards 120 (Akron dispute) and Award 121 (Cumberland dispute). PLB 3290 sustained the claims of the employees in both disputes. However, neither award discussed any provision of the written CSXT-UTU collective bargaining agreement or CSXT's undisputed past practice, incorporated in its operating rules

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/ In the Akron dispute (resulting in Award 120), the UTU's submission stated:

The issue in the instant claim is when flag protection is necessary, the Carrier should have used a member of the craft of conductors or trainmen.

*The Carrier's action of placing various orders into effect whereces in the case here before this Board, is tantamount to providing flag protection to contractor dismantling Market Street Bridge.*

J.A. 284 (emphasis added). In the Cumberland dispute (Award 121), the UTU submission stated that "[t]he placing of an order requiring a train to stop and proceed by authority is tantamount to flagging a train." J.A. 188.

and a part of its bargaining agreement, under which CSXT may control train movements at protected track sites by the use of its operating rules, including train orders and proceed signals. Instead, PLB 3290 relied upon CSXT's very use of these long-standing *alternative* operating rule procedures to conclude that CSXT was "required" to station a UTU-represented flagman at each construction site. J.A. 13,16.

For example, in Award 120 (Akron), PLB 3290 identified the issue to be decided as follows:

*The issue here in dispute, as we view it, concerns more the contention of the Organization [UTU] that there was a need for flag protection at the construction site regardless of the type of mechanical equipment or cranes being used by the contractor and that the Claimant or Claimants should have been called for such work.*

App. 23a, J.A. 13 (emphasis added). PLB 3290 found that "a flagging service was both needed and essentially being performed." J.A. 13. However, in reaching this conclusion, PLB 3290 neither cited nor purported to interpret any provision of the labor contract between UTU and CSXT. Instead, PLB 3290 relied upon the fact that the carrier had found a need to control train movements by issuing a train order. PLB 3290 stated, *inter alia*:

We [reach these conclusions] in the light of the Carrier having found need to place the train order in effect so as to have its engine and train crews stop at the construction site to check for debris before proceeding . . . .

J.A. 13. Thus, PLB 3290 relied upon the implementation of an alternative procedure expressly authorized by the carrier's controlling operating rules and undisputed past practice to conclude that "*a hazardous condition existed at the construction site that required the protection of a flagman.*" J.A. 13 (emphasis added).

PLB 3290's decision in Award 121 (Cumberland) was based upon the same rationale:

Essentially, the record shows that the Carrier's train order required all trains to stop unless they received verbal authority or a hand signal to proceed. Thus, it seems evident that the trains operating over the Carrier's main line were subject to being flagged through the construction site, with the work force employees permitting trains to proceed by either radio or hand communications signals.

J.A. 16. PLB 3290 thus relied upon the use of a train order and radio or hand communication signals to sustain the claims. Both are, however, long-standing and undisputed procedures that have become incorporated in the parties' agreement, and are specifically authorized by Rule 707(f), which has the stated purpose of permitting the carrier to operate safely without the need for flag protection. J.A. 159-60.

#### **District Court Proceedings**

The civil action from which this petition arises was initially commenced by UTU seeking to enforce Awards 120 and 121 pursuant to RLA Section 3, First (p), 45 U.S.C. § 153, First (p). CSXT answered and filed a counterclaim seeking review of the awards by PLB 3290 pursuant to RLA

Section 3, First (q), 45 U.S.C. § 153, First (q).<sup>8/</sup> UTU and CSXT filed cross-motions for summary judgment. On March 20, 1989, the district court held that "the awards must be set aside on the ground that [PLB 3290] has exceeded its jurisdiction by imposing operating rules upon CSX . . . ." App. 31a, finding that: (i) "[t]here is no dispute that CSX has the unilateral authority to dictate the operation and handling of its trains," App. 28a; (ii) in the disputes that gave rise to both awards, CSXT had controlled the train movements at protected work sites by train order and/or a superintendent's bulletin pursuant to its operating rules, App. 27a-28a; (iii) there was no evidence that any train had actually been "flagged," App. 29a; (iv) PLB 3290 "decided, in both awards, that CSX ought to have chosen to protect its trains by flagging," App. 30a; and (v) PLB 3290 exceeded its jurisdiction because "[t]he Board is not empowered to establish new rules for flag protection of trains passing through construction sites; that assessment is concededly the exclusive province of CSX." App. 32a.

#### Sixth Circuit Proceedings

UTU's appeal produced three separate opinions by the Sixth Circuit panel. On April 26, 1990, in an opinion by Judge Lively, the Sixth Circuit purported to reverse and remand the case to the district court "with directions to enter judgment enforcing the awards." App. 20a. Judge Lively's opinion was in four parts: part I summarized the case; part II summarized the legal standards and the contentions of the

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<sup>8/</sup> PLB 3290 is not a division of the NRAB, but was established by agreement between the UTU and the carrier pursuant to 45 U.S.C. § 153, Second. App. 6a. The awards of such "public law boards" are subject to judicial review and enforcement in the same manner and to the same extent as awards of the NRAB. See *Cole v. Erie Lackawanna Ry.*, 541 F.2d 528, 533 (6th Cir. 1976), cert. denied, 433 U.S. 914 (1977); cf. *Jones v. St. Louis-S.F. Ry.*, 728 F.2d 257, 262 n.4 (6th Cir. 1984).

parties; part III held that PLB 3290 did not exceed its jurisdiction; and part IV rejected alternative grounds that CSXT had advanced for affirmance of the district court's opinion. The critical portion of Judge Lively's opinion was part III, in which he concluded that the awards of PLB 3290 "can be read to state that the actions of CSX indicated that the railroad found a need for flagging and followed procedures that were the equivalent of flagging. Thus read the award did not re-write the collective bargaining agreement or impose a new rule requiring flagging through all construction sites." App. 14a.

The other panel members, Judges Kennedy and Guy, in separate opinions, dissented from part III of Judge Lively's opinion. Judge Kennedy stated that "I do not disagree with the majority's legal analysis, but rather with the conclusion that the Board confined itself to matters within its jurisdiction." App. 20a. Observing that "[f]or many, many years CSX has used train orders and proceed signals at some construction sites," Judge Kennedy found that examining PLB 3290's "opinions in the two cases makes it clear that it decided in appellant's favor not by interpreting the agreement and applicable 'shop law,' but rather by deciding that flagging was necessary at both sites and that CSX should have used the claimants." App. 22a-23a. Judge Kennedy found PLB 3290 exceeded its jurisdiction by (i) failing to draw the essence of its Awards from the collective bargaining agreement, as evidenced by "the fact that the Board failed to consider either the contract language or the 'law of the shop' here expressed in written rules which vested authority with CSX to determine whether to use flagmen or to issue train orders at construction sites . . .," and (ii) "chang[ing] a substantive rule regarding flag protection—that is, that CSX no longer has discretion to choose the means of protecting workers." App. 24a.

While Judge Guy concurred in parts I, II and IV of Judge Lively's opinion, he expressly dissented "from part III and

join[ed] with Judge Kennedy's resolution of that issue," stating that "I believe, as Judge Kennedy concluded, that the Board actually decided the need for flagging rather than the question that was properly before them." App. 25a.

On May 10, 1990, CSXT moved to amend the Sixth Circuit's judgment to conform to opinions and, in the alternative, petitioned for rehearing and suggested rehearing en banc. The ground for the motion was that the three initial opinions showed that a majority of the Sixth Circuit panel, i.e., Judges Kennedy and Guy, held that PLB 3290 had exceeded its jurisdiction. CSXT's motion was granted by the original panel on June 19, 1990. App. 1a-2a. UTU petitioned for rehearing and suggested rehearing en banc, which were denied by the Sixth Circuit on August 2, 1990. App. 3a.

#### **REASONS WHY THE PETITION SHOULD BE DENIED**

The decision of the Sixth Circuit in *UTU v. CSXT* does not warrant review by this Court. The Sixth Circuit applied uniform and stable standards of judicial review in affirming the vacating of awards that did not draw their essence from the collective bargaining agreement and imposed new substantive rules on the parties, thereby exceeding the arbitral board's jurisdiction.

UTU simply errs in asserting that the Sixth Circuit reviewed the merits of the contractual issues *de novo*. Instead, the Sixth Circuit determined that the awards ignored undisputed past practice evidenced in written operating rules that had become a part of the collective bargaining agreement, that they violated express limitations upon creating new rules, and that they determined the "need" for flagging, a matter outside the Board's jurisdiction. Such determinations are neither exceptional nor objectionable. Indeed, under the established and accepted standards of review of RLA

arbitration awards, courts must set aside arbitral awards that, as here, are not based on the terms of the relevant collective bargaining agreement but on the arbitrator's determination of "need," rewrite the collective bargaining agreement of the parties, and fail to take into account any existing common law of the particular plant or industry. Neither *Union Pac. R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gauthier v. San Diego & A. E. Ry.*, 382 U.S. 257 (1965), *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. \_\_\_, 109 S. Ct. 2477 (1989), nor the decisions of the courts of appeals upon which UTU relies conflict with the Sixth Circuit's decision to vacate such awards.

In fact, the authorities cited by UTU to establish a "conflict" merely involve instances where arbitrators did not make the same jurisdictional errors present in *UTU v. CSXT*. Such episodic distinctions, resulting from the application of uniform legal standards to disparate facts, does not present an issue of importance warranting this Court's review.

**I. The Sixth Circuit's Determination That The Public Law Board Exceeded Its Jurisdiction Neither Raises An Important Issue Requiring This Court's Attention Nor Conflicts With Decisions Of This Court**

**A. The Sixth Circuit Applied Uniform, Stable And Statutorily-Mandated Standards Of Review Of Arbitral Awards**

In *UTU v. CSXT*, the Sixth Circuit applied uniform and stable precedent concerning the statutorily-mandated judicial review of RLA arbitral awards. Indeed, in *UTU v. CSXT* both members of the majority expressly concurred in the minority's analysis of the standards of review of arbitral awards prescribed in 45 U.S.C. § 153, First (q). The minority in *UTU v. CSXT* discussed *Union Pac. R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gauthier v. San Diego & A.E. Ry.*, 382 U.S. 257 (1965),

and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. \_\_\_, 109 S. Ct. 2477 (1989) ("Conrail"), and concluded that in determining whether an arbitrator exceeded his jurisdiction "a court's duty is 'to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement.'" App. 11a (quoting *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir.), cert. denied, 444 U.S. 840 (1979)).<sup>9/</sup> Thus, contrary to UTU's claims, the majority in *UTU v. CSXT* expressly adopted and applied the determinative precedent of this Court in setting aside arbitral awards that did not "draw [their] essence from the contract," that rewrote the parties' agreement by "chang[ing] a substantive rule," and that "failed to consider either the contract language or the 'law of the shop.'" App. at 24a.

This Court recognized in *Gunther* that courts may set aside RLA arbitral awards that are "completely baseless and without reason." 382 U.S. at 261. "The requirement that the result of the arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract." *Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 411 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1970). Indeed, the decision in *UTU v. CSXT* was expressly grounded on the seminal decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his

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<sup>9/</sup> Judge Lively set forth his legal analysis of the standards of review, discussing *Sheehan*, *Gunther* and *Conrail*, in Part II of his opinion. App. 8a-11a. Judge Kennedy stated that he did "not disagree with the majority's legal analysis," App. 20a, and Judge Guy expressly concurred in Part II of Judge Lively's opinion. App. 25a.

own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

*Id.* at 597. Although *Enterprise Wheel* did not arise under the RLA, Congress in 1966 "sought to incorporate" the standard of review set forth in *Enterprise Wheel* in 45 U.S.C. § 153, First (q), which expressly authorizes district courts to review and set aside arbitral awards for "failure of the Adjustment Board to conform or to confine itself to matters within the scope of its jurisdiction. . . ." *Central of Georgia Ry.*, 415 F.2d at 411-12.<sup>10/</sup>

In any event, UTU errs in asserting that *Conrail*, *Sheehan* and *Gwinther* conflict with the Sixth Circuit's determination that Awards 120 and 121 exceeded the jurisdiction of the arbitral board. *Conrail* did not involve the review of an arbitral award under 45 U.S.C. § 153, First (q). Instead, *Conrail* set forth the standards to determine whether a dispute should be classified as "major" or "minor" i.e., whether a dispute had to be arbitrated. 109 S. Ct. at 2479. *Conrail* is simply inapposite, because in *UTU v. CSXT* there was no question that the dispute was minor and therefore subject to arbitration.

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<sup>10/</sup> See also *Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 921 (7th Cir. 1985) ("The question for a court reviewing a railroad arbitration decision is much the same—maybe exactly the same, though differently expressed—as when a court is asked to set aside a labor arbitrator's award in an industry subject to section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, rather than the Railway Labor Act.").

*Sheehan* and *Gunther* involved the review of arbitral awards, but neither involved the jurisdictional errors at issue in *UTU v. CSXT*. In *Sheehan* it was not even contended that the arbitral board had exceeded its jurisdiction or disregarded a contract term or past practice. 439 U.S. at 93.11/ In *Gunther*, the arbitral board did not disregard the contract or past practice, but expressly relied on both in ordering reinstatement of an employee who had been physically disqualified by the company's doctors, but who was found to be physically qualified by a committee of doctors appointed by the arbitrators. *Id.* at 259. It was the district court in *Gunther* that disregarded past practice and rewrote the agreement by finding "nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians." *Id.* at 261.

The Sixth Circuit's insistence that the arbitral board refrain from changing the parties' collective bargaining agreement is equally well grounded on the RLA and this Court's precedent. Indeed, the arbitrator's lack of jurisdiction to amend the agreement is not a mere creature of contract, but is a fundamental rule of labor arbitration. *See, e.g., Enterprise Wheel*, 363 U.S. at 597; *Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984) ("[t]his attempt to rewrite the agreement is a clear violation of the Railway Labor Act"); *Timken Co. v. Local 1123, Steelworkers*, 482 F.2d 1012, 1015 n.2 (6th Cir. 1973).

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11/ Indeed, in *Sheehan* the arbitral board had concluded that it was without jurisdiction by applying the limitations period contained in the collective bargaining agreement. This Court reversed the Tenth Circuit's attempt to impose a "legal" requirement of equitable tolling from outside the contract. 439 U.S. at 91-93.

Here, however, UTU and CSXT expressly adopted this requirement in the agreement establishing PLB 3290, placing unambiguous restrictions upon its jurisdiction:

The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules.

App. 21a. It is indisputable that there must be "strict adherence" to such restrictions upon arbitral authority. *Jones v. St. Louis-S.F. Ry.*, 728 F.2d 257, 264 (6th Cir. 1984).

The special [public law] boards' jurisdiction is limited to the jurisdiction that is conferred thereupon by the agreement between the carrier and the union.

*Id.* (citing *Switchmen's Union v. Clinchfield R.R.*, 310 F. Supp. 606, 610 (E.D. Tenn. 1969), *aff'd sub nom., United Transp. Union v. Clinchfield R.R.*, 427 F.2d 161 (6th Cir.), *cert. denied*, 400 U.S. 824 (1970)); *see also Timken*, 482 F.2d at 1015 (vacating arbitral award that was not based upon contract or past practice—contract expressly "foreclos[ed] arbitrator from substituting his discretion for the company's and from modifying the language of the agreement").

Further, vacating awards that ignore and thereby write out of the agreement either the contract language or the "law of the shop" neither conflicts with this Court's precedent nor presents an important issue warranting review. "[A]rbitrator[s] may not ignore the plain language of the contract . . . ." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *accord Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987). Further, this Court has previously denied a writ of certiorari to the Fourth Circuit in a case in which an arbitral

award that did not take into account and disregarded relevant provisions of the collective bargaining agreement was vacated. *See Baltimore & O. R.R. v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 Lab. Cas. (CCH) ¶ 10,261 at 20,982 (4th Cir. 1987) ("[W]here an arbitrator fails to discuss, in his decision, critical contract terminology, which might reasonably require the opposite result, the award cannot be considered to draw its essence from the contract."), *cert. denied*, 484 U.S. 1008 (1988).<sup>12/</sup>

Indeed, requiring an arbitrator to consider relevant past practice is necessary to ensure that the arbitral award draws its essence from the collective bargaining agreement, because the "law of the shop" is a part of the collective bargaining agreement. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it.

*Id.* Although *Warrior & Gulf* was decided under the Taft-Hartley Act, it is clear that past practices, including those that recognize management's right to act, may become valid and binding parts of collective bargaining agreements under the RLA. *See, e.g., Detroit & T. S.L. R.R. v. UTU*, 396 U.S. 142,

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<sup>12/</sup> *See also Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982) ("the arbitrator must take into account any existing common law of the particular plant or industry, for it is an integral part of the contract."); *Timken Co. v. Local 1123, Steelworkers*, 482 F.2d 1012, 1015 (6th Cir. 1973) (refusing to enforce an award that ignored unambiguous terms of the collective bargaining agreement and "made no reference whatsoever to shop practices").

152-55 (1969)(established practices "became in reality a part of the actual working conditions"); *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 705 (7th Cir. 1987)(“The parties' collective agreement . . . includes both the specific terms set forth in the written agreement and any well-established practices that constitute a 'course of dealing' between the carrier and the employees.”)(footnote omitted). As this Court recently stated, "collective-bargaining agreements may include implied, as well as express, terms . . . [and] the parties' 'practice, usage and custom' is of significance in interpreting their agreement." *Conrail*, 109 S. Ct. at 2485.

In summary, there is neither a dispute over the standards of judicial review of RLA arbitration awards nor a basis for one. Further, as will next be shown, the application of these standards below does not warrant review by this Court.

**B. The Sixth Circuit's Application Of Uniform And Stable Precedent To The Unique Facts Of *UTU v. CSXT* Does Not Warrant Review By This Court**

Contrary to UTU's claim, the majority in *UTU v. CSXT* applied well established principles of judicial review of arbitral awards in strict compliance with the statutory mandate and the precedent of this Court. The majority found that PLB 3290 flatly ignored unambiguous operating rules and undisputed past practices of more than 12 years duration. App. 21a-22a. These unambiguous rules and past practice, which had become a part of the parties' agreement, established alternative procedures for controlling the movement of trains at obstructed track sites. These rules and practices reserved to CSXT the right to determine which procedure would be utilized. App. 21a-22a, J.A. 318-19. The majority found that PLB 3290 ignored and usurped CSXT's undisputed right to control the safe operations of its trains by determining whether to use the alternative train order procedures or flagging. For example, PLB 3290 ignored Operating Rule 707,

which is entitled "Work Authority to Work Without Flag Protection," and which provides, *inter alia*:

707(f) When *conditions* will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and 707(d), or if the nature of the work may cause equipment to foul adjacent tracks, work by Work Force(s) may be performed under traffic without flag protection by use of a train order.

App. 21a (emphasis added).<sup>13/</sup>

The majority below also found that, having failed to draw the essence of its award from the contract, PLB 3290, contrary to law and the express restriction upon its authority, rewrote the contract by "chang[ing] a substantive rule regarding flag protection - that is, that CSXT no longer has discretion to choose the means of protecting workers." App. 24a. PLB

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<sup>13/</sup> The minority below clearly erred in asserting that Rule 707(f) "does not provide an alternative to flagging in all circumstances and under all conditions." App. 14a. First, the minority erred in interpreting rules which PLB 3290 ignored and, by so construing the parties' agreement, committed the precise error that it claimed the district court had made. Second, in quoting and discussing the "conditions" referred to in Rule 707(f), the minority omitted the crucial cross-references to Rules 707(c) and (d), quoted above, which provide procedures for protecting track sites without flag protection by completely eliminating train traffic on the affected track. J.A. 41-42. When "conditions," i.e., traffic levels, will not permit CSXT to take the track upon which work will be performed completely out of service or if work on one track will interfere with adjacent tracks, Rule 707(f) clearly gives CSXT the discretion to control traffic by train order without flagging. There is absolutely nothing in the terms of Rule 707, which is devoted *in its entirety* to controlling train movements *without flag protection*, that establishes conditions precedent to this exercise of CSXT's discretion. Further, even if Rule 707 imposed any form of "conditions," it is absolutely clear, as the majority below observed, that UTU never contested "the existence of conditions giving CSX discretion [to use train orders]" before PLB 3290, the district court or the Sixth Circuit. App. 21a n.1.

3290 would in effect require CSXT always to use flagging--contrary to undisputed past practice and unambiguous operating rules. Further, the majority in *UTU v. CSXT* found that PLB 3290 had not merely erred in interpreting the collective bargaining agreement, but had completely "failed to consider the contract language or the 'law of the shop' here expressed in written rules which vested authority with CSX to determine whether to use flagmen or issue train orders at construction sites." App. 24a.

UTU's mere disagreement with the Sixth Circuit's application of well established standards to the particular facts in *UTU v. CSXT* does not present an important issue meriting review, as illustrated by this Court's repeated denial of writs of certiorari in cases in which courts of appeals have held that arbitral awards must be set aside based on jurisdictional defects similar to those found in *UTU v. CSXT*.<sup>14/</sup> Further, *Dixie Warehouse & Cartage Co. v. Teamsters, Local 89*, 133 L.R.R.M. (BNA) 2942 (6th Cir. 1990), cited by UTU, confirms that the Sixth Circuit recognizes and applies the correct standard and simply reaches different results based on different facts. In *Dixie Warehouse* the Sixth Circuit, citing this Court's decision in *Misco*, refused to vacate an arbitral award, holding that "an arbitrator [may] construe the contract to give him authority to review penalties in the absence of a provision

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<sup>14/</sup> See, e.g., *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255, 1271 (8th Cir. 1988)(vacating arbitral award that was found to be "not in any way derived from the 'wording or purposes of the collective bargaining agreement'"), cert. denied, 109 S. Ct. 1340 (1989); *Baltimore & O. R.R. v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 Lab. Cas. (CCH) ¶ 10,261 (4th Cir. 1987)(award vacated for failure to discuss critical contract terminology), cert. denied, 484 U.S. 1008 (1988); *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir. 1982)(rewriting unambiguous contract terms), cert. denied, 460 U.S. 1023 (1983); *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir.)(award that was not rationally derived from contract or past practice must be set aside), cert. denied, 444 U.S. 840 (1979).

explicitly prohibiting such action." 133 L.R.R.M. at 2946. There is absolutely no conflict in the legal standards applied in *Dixie Warehouse* and *UTU v. CSXT*--both decisions expressly applied the standards of review set forth in *Enterprise Wheel*, and *Dixie Warehouse* expressly recognized that arbitrators exceed their jurisdiction if they "ignore[ ] the 'clear and unambiguous' language of the contract." See App. 22a and 133 L.R.R.M. at 2944. Indeed, Judge Kennedy, who authored the majority opinion in *UTU v. CSXT*, voted to affirm the award in *Dixie Warehouse*. Further, neither *Misco* nor *Dixie Warehouse* is in conflict with *UTU v. CSXT*, because neither involved an arbitrator's ignoring unambiguous portions of the parties' agreement evidencing a company's unilateral right to determine how safely to conduct its operations, i.e., to determine the "need" for flagging or an alternative procedure, to protect obstructed track.

Thus, *UTU v. CSXT* does not conflict with the precedent of this Court or other decisions of the Sixth Circuit and does not warrant review by this Court.<sup>15/</sup> As will next be shown, it also does not conflict with the decisions of other courts of appeals.

## II. The Sixth Circuit's Determination That The Public Law Board Exceeded Its Jurisdiction Does Not Conflict With Decisions Of Other Courts Of Appeals

UTU relies upon various decisions from the Second, Fifth, Seventh and Eighth Circuits to establish a conflict with *UTU v. CSXT* or demonstrate an important issue. UTU asserts that these decisions establish a risk of inconsistent adjudications, citing *St. Louis-S.W. Ry. v. Brotherhood of Ry., Airline & S.S.*

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<sup>15/</sup> Even if *UTU v. CSXT* were in conflict with *Dixie Warehouse*, which it is not, conflicts between decisions of the same circuit do not normally warrant review by this Court. See *Davis v. United States*, 417 U.S. 333, 340 (1974).

*Clerks*, 484 U.S. 907, 908 (1987)(White, J., with whom Brennan, J. joined, dissenting from denial of writ of certiorari).

There is no similarity between the issues presented in *St. Louis-S.W. Ry.* and *UTU v. CSXT*. *St. Louis-S.W. Ry.* presented a direct conflict on a question of federal law—whether an arbitrator may award pure penalty pay absent explicit contractual authorization. 484 U.S. at 908. In contrast, *UTU v. CSXT* does not present a cognizable legal conflict. Indeed, the standard of review applied by the Sixth Circuit in *UTU v. CSXT* has been uniformly acknowledged by other courts of appeals, including the courts that *UTU* claims are in conflict with the Sixth Circuit's decision in *UTU v. CSXT*. See, e.g., *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255, 1270-71 (8th Cir. 1988), cert. denied, 109 S.Ct. 1340 (1989); *Schneider v. Southern Ry.*, 822 F.2d 22, 24 (6th Cir. 1987); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1195 (7th Cir. 1987)(standard of judicial review is whether Board "interpreted the contract"; party can complain "if the arbitrators don't interpret the contract—that is, if they disregard the contract and implement their own notions of what is reasonable and fair"); *Walsh v. Union Pac. R.R.*, 803 F.2d 412, 414 (8th Cir. 1986)(“it is well-established that if an arbitrator's award does not draw its essence from the collective bargaining agreement, the reviewing court must vacate or modify the award.”), cert. denied, 482 U.S. 928 (1987).

It is equally well-settled that an arbitrator may not amend the collective bargaining agreement. See *Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984)(vacating arbitral award that disregarded contractual time limitations—“[t]his attempt to rewrite the agreement is a clear violation of the Railway Labor Act, and is a proper basis for the district court to set aside the awards.”); see also, e.g., *In re Marine Pollution Service, Inc.*, 857 F.2d 91, 96 (2d Cir. 1988)(vacating arbitral award that was not based on an express or implied term of the collective bargaining agreement); *Sears, Roebuck*

*& Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir.1982) ("arbitrator exceeded his authority by amending the express terms of the agreement"), *cert. denied.*, 460 U.S. 1023 (1983).

The appellate decisions upon which UTU relies apply the same legal standards as the Sixth Circuit in *UTU v. CSXT*, but distinguishable facts mandated affirmance of the arbitral awards. For example, the decisions of the Seventh Circuit cited by UTU merely affirm arbitral awards that were found to be logically derived from the collective bargaining agreement. *See C&NW Transp. Co. v. United Transp. Union*, 134 L.R.R.M. (BNA) 2607, 2608 (7th Cir. 1990) (arbitral board "rationally arrived at an interpretation of the [contract]"); *Hill v. Norfolk & W. Ry.*, 814 F.2d at 1195-7 (affirming arbitral award that expressly interpreted a term of the collective bargaining agreement, *i.e.*, the term "conviction" in an operating rule incorporated in the agreement). Neither *C&NW* nor *Hill* involved, as here, a complete disregard of the contract and the changing of its terms. In those circumstances, the Seventh Circuit would clearly vacate the arbitral award. *See Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d at 967 (vacating award that "attempt[ed] to rewrite the agreement").

The Eighth Circuit's decision in *Walsh v. Union Pac. R.R.*, 803 F.2d at 414, cited by UTU, is inapposite, and simply affirmed an arbitral award ordering that an employee be reinstated without backpay. The decision in *Walsh* was based on the deference given to arbitrators in formulating remedies, and the Eighth Circuit expressly found that "the award . . . was the [arbitral] Board's well-considered attempt to balance the conduct of the parties in light of the existing labor contract." *Id.* *Walsh*, which did not involve an arbitrator's ignoring the contract and past practice, hardly demonstrates a conflict between the Eighth and Sixth Circuits. Indeed, the Eighth Circuit's more recent decisions clearly hold that arbitral awards that do not discuss probative parts of the contract are

not entitled to be enforced—a position fully consistent with *UTU v. CSXT*. See *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9*, 879 F.2d 347 350-2 (8th Cir. 1989)(citing *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d at 1263, 1270-1).

Similarly, *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979), cert. denied, 449 U.S. 854 (1980), and *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 234 (5th Cir. 1970), merely involved alleged misinterpretations of the contract by the arbitrator. Both the Second and Fifth Circuits, however, clearly permit courts to vacate awards that are not based on or ignore an express or implied term of the collective bargaining agreement. See *In re Marine Pollution Service, Inc.*, 857 F.2d at 94-6; *Diamond*, 421 F.2d at 233 (arbitral award is not "conclusive" when, *inter alia*, it is "so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator'"')(quoting *Central of Georgia Ry.*, 415 F.2d at 411-2).

In summary, there simply is no conflict between the circuit courts of appeals to resolve—the standards applied by each of the circuits are identical and authorize vacating arbitral awards that exceed the arbitration board's jurisdiction. The Sixth Circuit's application of these uniform standards to the unique facts in *UTU v. CSXT* does not present a conflict with the other courts of appeals warranting review by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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